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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 569

MUNICIPAL ACCEPTANCE CORPORATION, A CORPORATION,

Petitioner,

vs.

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, UNITED STATES OF AMERICA, AND ROY F. YOKE, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, IN THE STATE OF WEST VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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vs.

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, UNITED STATES OF AMERICA, AND ROY F. YOKE, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, IN THE STATE OF WEST VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Petitioner, Municipal Acceptance Corporation, seeks a writ of *certiorari* to the Supreme Court of Appeals of West Virginia to review its judgment rendered June 22, 1940 (R. 212-219), rehearing denied September 16, 1940 (R. 253), reversing a decree of the Circuit Court of Raleigh County,

West Virginia, pronounced in this cause August 23, 1939, and deciding that the rights of petitioner were finally adjudicated by a decree of said Circuit Court pronounced March 10, 1939 (R. 212-219). This application is made prior to December 14, 1940, U. S. C. A. Title 28, section 350.

II.

The jurisdiction of this Court is asserted under Judicial Code, sub-division "(b)" of section 237, amended U. S. C. A. Title 28, sub-division "(b)" of section 344, and Rule 38 of this Court.

III.

1. The statutes of the United States, the application of which are in question, are U. S. C. A. Title 26, section 3670, and sub-divisions "(a)" and "(1)" of section 3672, (1) (Apx. p. 16), to be construed with reference to Acts Legislature West Virginia, 1927, chap. 56, now Article 10, chap. 38 Code of West Virginia, requiring Federal tax liens to be recorded. (2) (Apx. p. 16).

2. The provision of the Federal Constitution invoked by the petitioner is section 10 of Article I, inhibiting a State from passing a law impairing the obligation of contracts.

3. The provision of the Amendment to the Federal Constitution invoked by the petitioner is the due process clause of section 1 of the XIV Amendment.

IV.

Summary and Brief Statement.

The facts are that by three conditional sale contracts dated November 7, 1929, June 3, 1930 and February 7, 1931, Fairbanks-Morse & Company, assignor of petitioner, sold and delivered six Diesel engines and equipment to Price Hill Colliery Company to be paid for in installments. Each

contract expressly reserved title to and ownership of the engines and equipment in the seller until full payment was made by the Colliery.

The Colliery being insolvent, this suit was instituted May 26, 1938 (R. 6-11), and by amended bill (R. 115-20) was more certainly made a suit to administer and wind up its corporate affairs pursuant to section 82 of art. 1, chap. 31, Official Code West Virginia 1931, (3), (Apx. p. 17), and all assets of the Colliery were on that day by decree committed to the custody of receivers until sale thereof could be made. The court on that day also issued an injunction (R. 5-6), enjoining petitioner and others from in any manner interferring with the possession by the receivers of the assets of the Colliery, whereby petitioner was prevented from exercising the right to repossess the engines and equipment for default made by the Colliery in the payment of installments of the purchase price as it otherwise had the right to do under the express terms of the contract. The cause was referred to a commissioner in chancery (R. 63) to ascertain and report the property and assets of the Colliery, the liens thereon and their priorities. Petitioner filed the three conditional sale contracts with commissioner and proved accrued unpaid installments and interest to the amount of $16,787.39 (R. 55-62, 69-70). The United States proved its claim for taxes, penalties and interest against the Colliery to the amount of $23,824.12. The State Tax Commissioner proved the claim of the State against the Colliery for taxes, penalties and interest to the amount of $27,848.45 (R. 65-6). The assets of the Colliery sold under decree for approximately $52,000.00, of which $22,100.00 was derived from sale of the six engines and equipment. After the payment of receivership and other costs the proceeds of sale are insufficient to discharge taxes, penalties and interest found to be owing by the Colliery to the Federal and State governments.

A decree was pronounced in the cause March 10, 1939, with respect to the Commissioner's report (R. 82), and a supplemental decree pronounced in the cause August 23, 1939, (R. 165) directed that the proceeds derived from the sale of the engines and equipment be first applied to the payment of the unpaid installments of the purchase price and interest thereon. Section 17, art. 15, chap. 108, Acts 1937 and section 12 of art. 13, chap. 33 Acts First Ex. Sess. 1933, amended by section 12, art. 13, chap. 106 Acts 1937, and again amended by section 12, art. 13, chap. 120 Acts 1939, Legislature West Virginia, (4), (Apx. pp. 18-19) provide that the lien of the State of West Virginia for taxes "shall have priority over all other liens and obligations except those due the United States", and the Supreme Court of Appeals of West Virginia, in a decision rendered simultaneously with its decision in this cause, construed these statutes to be retroactive in their operation to displace valid liens created prior to the time such taxes accrued to the State.[5]

The State Tax Commissioner prosecuted an appeal from the decree of August 23, to the Supreme Court of Appeals of West Virginia. The United States did not appeal from that decree.

The relative rights of seller and purchaser under conditional sale contracts in West Virginia are defined and fixed by Article 3, chap. 40, Code West Virginia. The provisions of that article, applicable to this controversy, are in sections 1 to 6, and 11 and 16 (5) (Apx. pp. 19-21).

For the purpose of appeal parts of record of this cause in the Circuit Court were by stipulation omitted from the record on appeal (R. 176-179). A stipulation made be-

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[5] *Moran* v. *Leccony Smokeless Coal Co.*, 10 S. E. (2d) 578, not yet officially reported. (A copy of this opinion also appears in the record in the companion case of *Piney Coking Coal Land Company* v. *James* (page 199), No. 568, October Term, 1940.)

tween counsel after appeal was taken admits that the three contracts by which the engines and equipment were sold are uniform in their provisions; that they were duly filed in the office of the clerk of the county court of Raleigh County within the time and in the manner provided by law, and were thereafter refiled as provided by section 11, article 3, chapter 40, Code West Virginia; and recites certain provisions of these contracts among which is that the title and ownership of the engines and equipment sold were retained in the seller until final and full payment therefor was made by the Colliery (R. 1-5).

On appeal the Supreme Court of Appeals reversed the decree of August 23 both as to the claims of the United States and the State of West Virginia for taxes, penalties and interest, and interpreted the decree of March 10 as having finally adjudicated that the several liens of the United States and of the State for taxes, penalties and interest attached to the interest of petitioner in the engines and equipment, and that such tax liens were prior to the right of petitioner to receive out of the proceeds derived from the sale of the engines and equipment the unpaid instalments of the purchase price and interest thereon.

V.

The questions sought to be reviewed are:

First. Did the Supreme Court of Appeals of West Virginia properly apply U. S. C. A. Title 26, section 3670, and sub-divisions "(a)" and "(1)" of section 3672 of that Title, in deciding that the lien of the United States for its taxes, penalties and interest is prior to the property right of petitioner in the engines and equipment under conditional sale contracts reserving title and ownership in the seller until full payment was made of sale price and interest?

Second. May the state deprive petitioner of its property right in the engines and equipment by the refusal of the Supreme Court of Appeals of West Virginia to pass on the Federal and Constitutional questions raised, and its decision interpreting the decree of March 10, 1939, as holding that the lien of the state for its taxes, penalties and interest, was prior to such property right of the petitioner under the conditional sale contracts, when the provisions of such decree do not warrant such interpretation?

Third. Does the State by the decision of the Supreme Court of Appeals in this cause deny to petitioner the equal protection of the laws of the State within the meaning of the due process clause of Amendment XIV, section 1 of the Federal Constitution?

Fourth. Does the taking by the State, under the tax statutes of West Virginia, of so much of the proceeds derived from the sale of the engines and equipment as is necessary to discharge unpaid installments of the contract price therefor, and interest thereon, and application thereof to the payment of excise taxes owing by the Colliery to the State, impair the obligation of the conditional sale contracts within the meaning of Article I, section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts?

Fifth. Does the taking by the State of so much of the proceeds derived from the sale of the engines and equipment as is necessary to discharge unpaid installments of the contract price therefor and interest thereon, and application thereof to the payment of excise taxes owing by the Colliery to the State deprive petitioner of its property in the engines and equipment without due process within the meaning of Amendment XIV, section 1, of the Federal Constitution?

How Federal and Constitutional Questions Raised.

The decree of August 23, 1939, was in favor of petitioner and the Federal and constitutional questions involved were raised in the Supreme Court of Appeals by brief filed on behalf of petitioner, pages 16-19, 21-25, 45-54 (ten copies of the brief filed on behalf of the Municipal Acceptance Corporation in the Supreme Court of Appeals of West Virginia have been lodged with the Clerk of this Court as exhibits to this petition), and petition for rehearing, pages 11-12, 19, 20, 29, 30 (R. 220).

VI.

Reasons Suggesting Necessity for Issuance of Writ.

The following reasons indicate that the points involved in this cause are sufficiently important to justify the issuance of the writ of certiorari:

It is manifestly a matter of grave public concern that the property right of petitioner in the engines and equipment is taken by the State without compensation and appropriated to the payment of excise taxes owing to it by the Colliery.

First. (1) The lien of the United States for taxes owing to it by the Colliery did not attach to the property right of petitioner in the engines and equipment under the conditional sale contracts, because to the extent of the unpaid installments of the purchase price and interest, title to the engines and equipment was not in the Colliery. Wherefore, the interest of petitioner in this property was not subject to be taken for taxes owing by the Colliery to the United States.

Moran v. *Leccony Smokeless Coal Co.*, 10 S. E. (2d) 578 (1940);

Title 26, U. S. C. A., Secs. 3670, 3672 "(a)" "(1)";

United States v. *Beaver Run Coal Co.*, 99 F. (2d) 610 (1938);
Sherwood v. *United States*, 5 F. (2d) 991 (1925).

(2) The United States and the State of West Virginia claimed taxes against the Colliery as distinct sovereignties under separate tax systems provided for by the Congress of the United States and the Legislature of West Virginia, respectively. The decree pronounced by the Circuit Court August 23, adjudicated the property right of petitioner in the engines and equipment to be paramount to the lien of the United States for taxes. The United States submitted to that adjudication by its failure to appeal from that decree. Wherefore, that part of the decree was not subject to be disturbed by the Supreme Court of Appeals on the appeal of the State Tax Commissioner.

Code W. Va., Chap. 58, Art. 5, Sec. 4 (Apx., p. 21) (6);
Bowlby v. *DeWitt*, 47 W. Va. 323;
Todd v. *Daniel*, 16 Pet. 521 (U. S.) (1842), 10 L. Ed. 1054;
Hanrick v. *Patrick*, 119 U. S. 156 (1886), 30 L. Ed. 396;
Gilfillan v. *McKee*, 159 U. S. 303 (1895), 40 L. Ed. 161.

Second. (1) The decree of March 10, 1939, entered with respect to the Commissioner's report (R. 81-100), like the Commissioner's report, separated claims of creditors into three distinct categories: (a) "general liens and their priorities" (R. 93-94, 65, 69-70); (b) "Specific liens against specific properties", and (c) claims against "specific personal property represented by conditional sale agreements duly recorded" * * * (R. 69), and it was under subdivision "(c)" that the commissioner in his report dealt with the property right of petitioner in the engines and equipment.

The pertinent parts of this decree (R. 97-98), which the

Supreme Court of Appeals sought to interpret as finally adjudicating the lien of the State for its taxes to be prior to the property right of petitioner in the engines and equipment, follow:

> (a) It is further adjudged, ordered and decreed that for the purpose of paying off, satisfying and discharging the several liens as hereinabove ascertained and adjudged that the proceeds of the sale thereof be marshalled,
>
> (b) and as to those lands, interests in lands and personal properties or other properties against which there are no specific liens the same be applied first to the payment of the above recited receivership costs and the general liens in the order of their several priorities, including the general cost of these proceedings
>
> (c) before any part of the proceeds of the sale of the other lands, interests in lands and other properties are so applied
>
> (d) and the residue, if any, shall be first applied to the specific liens in the order of their respective priorities.

This incomplete decree, when analyzed and fairly construed in the light of the Commissioner's report, is not susceptible of the interpretation given to it by the decision of the Supreme Court of Appeals of West Virginia. Considered in the order stated above:

> (a) This part of the decree does not state the proceeds of what properties when sold are to be marshalled;
>
> (b) This part of the decree relates to the proceeds to be derived from those lands, interest in lands and personal properties or other properties against which

there were no specific liens, and directed that such proceeds should be applied first to the payment of receivership costs and the general liens in the order of their several priorities, including the general cost of the proceedings. It does not in any way apply to proceeds to be derived from the sale of properties against which there were specific liens;

(c) This part of the decree is a mere recital. It is not an adjudication.

This decree does not provide that the proceeds derived from the sale of lands against which there were specific liens should be applied as the proceeds derived from the sale of properties against which there were no specific liens should be applied as set forth in the above quoted subdivision "(b)";

(d) The phrase "and the residue, if any" refers to the residue of the proceeds derived from the sale of properties of the company against which there was no specific lien. It does not apply to the proceeds derived from the sale of properties against which there were specific liens.

(2) The Circuit Court had the right to complete the decree of March 10 by the supplemental decree of August 23, so as to direct the disposition of proceeds derived from sale of the engines and equipment and other properties not disposed of by prior decree.

Dorsheimer v. *Rorback*, 24 N. J. Eq. 33, and page 36 (1873);

Brittenham v. *Robinson* (Ind.), 54 N. E. 133 (1899), and page 135;

Jones v. *Davenport* (N. J.), 17 Atl. 570 (1899), syl. pt. 3 and page 572;

Bostwick v. *VanVleck* (Wis.), 82 N. W. 302 (1900), syl. pts. 1 and 2 and page 303;

Sprague v. *Jones,* 9 Paige 395 (1842);
Young, Guardian v. *Sadler* (Ky.), 24 S. W. 877 (1893), syl. pt. 1;
First State Bank v. *Stevenson* (Kan.), 70 Pac. 875 (1902);
Salter v. *Sutherland* (Mich.), 85 N. W. 112 (1901);
34 C. J., Sections 452, 454, 456, pages 235-236.

(3) The right of petitioner in the engines and equipment was not a lien, but that of proprietary ownership which never vested in the Colliery, because of its failure to complete payment of the purchase price.

Moran v. *Leccony Smokeless Coal Co.,* 10 S. E. (2d) 578 (1940);
Harkness v. *Russell & Co.,* 118 U. S. 663 (1885), 30 L. Ed. 285.

(4) The State may not deprive petitioner of its property right in the engines and equipment by the refusal of the Supreme Court of Appeals of West Virginia to pass on the Federal and constitutional questions raised, and basing its decision on an unwarranted interpretation of the decree of March 10. This Court is not concluded by the interpretation which the Supreme Court of Appeals gave to that decree.

Northern Pacific Railway Co. v. *North Dakota,* 236 U. S. 585 (1914), 59 L. Ed. 735;
Aetna Life Ins. Co. v. *Dunken,* 266 U. S. 389 (1924), 69 L. Ed. 342;
Norris v. *State of Alabama,* 294 U. S. 587 (1934), 79 L. Ed. 1074;
Truax v. *Corrigan,* 257 U. S. 312 (1921), 66 L. Ed. 254;
Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U. S. 673 (1929), 74 L. Ed. 1107;
Pierre v. *State of Louisiana,* 306 U. S. 354 (1938), 83 L. Ed. 757;

Great Northern Railway Co. v. *The State of Washington,* 300 U. S. 154 (1936), 81 L. Ed. 573.

(5) The proposed tax assessment against petitioner and its property having been arrived at by the adoption of fundamentally wrong principles, deprives petitioner of its property without due process and denies it the equal protection of the law and is therefore not final, but subject to review by this Court.

L. & N. R. Co. v. *Greene,* 244 U. S. 522, 536, 61 L. Ed. 1291 (1917);

C. B. & Q. R. Co. v. *Babcock,* 204 U. S. 585, 596, 51 L. Ed. 636 (1907);

Great Northern R. Co. v. *Weeks,* 297 U. S. 135, 139, 80 L. Ed. 432 (1936), and the numerous other cases listed in the opinion in *City of Detroit* v. *Tunnel Co.,* 92 F. (2d) 833, at p. 836.

(6) The practical effect of the West Virginia sales tax statutes, the decree of March 10, 1939, and the construction put on said statutes and decree by the decision of the Supreme Court of Appeals of West Virginia, being to abrogate and destroy petitioner's property in the engines and equipment, the constitutional rights of petitioner are directly and immediately affected thereby, presenting questions for the review and determination of this Court.

Shaffer v. *Carter,* 252 U. S. 37, 64 L. Ed. 445 (1920), and earlier decisions of this Court noted at 252 U. S. 55;

Stewart Dry Goods Co. v. *Lewis,* 294 U. S. 550, 555, 79 L. Ed. 1054 (1935).

(7) Insofar as the decree of March 10, 1939, purported to adjudicate liens against the Colliery, it did not judicially determine the rights of petitioner as owner of property in which, until payment of its purchase price, the Colliery had no interest to which *any* lien against it could attach. When

the same court on June 8, 1939, purported to order the "equity" in the engines and equipment sold, it could in the nature of the case have decreed sale only of the Colliery's right to acquire title by paying petitioner the unpaid purchase price. The court's subsequent action in ordering the engines and equipment sold "free and clear" was a complete nullity as to petitioner except and unless it contemplated that the first proceeds of the sale of petitioner's own property should come to petitioner. Neither the Colliery nor its receivers ever having had any interest in the property with which the circuit court could deal in the manner in which the Supreme Court of Appeals now holds that the circuit court meant by the decree of March 10, 1939 to deal with it, any statute and any decree under the purported authority of such statute attempting under the guise of an adjudication of liens against the property of the Colliery to seize petitioner's property in satisfaction of a tax retroactively assessed against the Colliery, was an invasion and impairment of petitioner's constitutional rights.

In Re Pointer Brewing Co., 105 F. (2d) 478 (1939);

In Re White Plains Ice Service, 109 F. (2d) 913 (1940);

In Re Lake's Laundry, 11 Fed. Supp. 237, affirmed 79 F. (2d) 326, 102 A. L. R. 247 (1935), certiorari denied *Lakes' Laundry* v. *Braun*, 296 U. S. 622, 80 L. Ed. 442;

General Motors Acceptance Corporation v. *Hayes Motor Co.*, 172 Atl. (N. J. 1934) 343, 346;

Moran v. *Leccony Smokeless Coal Co.*, 10 S. E. (2d) 578, 582-3 (W. Va. 1940);

Ohio Oil Co. v. *Conway*, 281 U. S. 146 (1930);

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77 (1938).

Third. The Supreme Court of Appeals of West Virginia, in the case of *Moran* v. *Leccony Smokeless Coal Company*,

supra, expressly held that a lien in favor of the State of West Virginia, for taxes under the tax laws of the State, does not attach to the property right reserved to a vendor of personal property under conditional sale contracts such as the contracts by which Fairbanks-Morse & Company sold the engines and equipment to the Colliery, and the decision of the Supreme Court in this cause, holding that the lien of the State for taxes owing by the Colliery attached to the reserved property right of petitioner in the engines and equipment, denies to petitioner the equal protection of the laws of the State of West Virginia, and contravenes Amendment XIV, section 1 of the Federal Constitution.

Moran v. *Leccony Smokeless Coal Co.,* 10 S. E. (2d) 578 (1940);

Dobbins v. *Los Angeles,* 195 U. S. 223 (1904), 49 L. Ed. 169;

Yick Wo v. *Hopkins,* 118 U. S. 356 (1886), 30 L. Ed. 220;

Jew Ho v. *Williamson,* 103 Fed. 10;

Park Hill Dev. Co. v. *City of Evansville,* (Ind.) 130 N. E. 645.

Fourth. The right of petitioner in the engines and equipment was that of proprietary ownership not subject to be taken by the State for taxes owing to it by the Colliery, and the taking of such property by the State for that purpose impaired the obligation of the conditional sale contracts within the meaning of Article 1, section 10 of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts.

United States v. *City of Quincy,* 71 U. S. 535 (1866), 18 L. Ed. 403;

Green v. *Biddle,* 21 U. S. 1 (1823), 5 L. Ed. 547;

LeSage v. *Switzer,* 116 W. Va. 657, 182 S. E. 797.

Fifth. The right of petitioner in the engines and equipment was that of proprietary ownership not subject to be taken by the State for taxes owing to it by the Colliery, and the taking of such property by the State for that purpose deprived petitioner of its property in the engines and equipment without due process within the meaning of Amendment XIV, section 1 of the Federal Constitution.

Chicago, Burlington and Quincy R. Co. v. *Chicago,* 166 U. S. 226 (1896), 41 L. Ed. 979;

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505 (1929), 74 L. Ed. 999;

State v. *Walruff,* 26 Fed. 178 (1886).

Wherefore, your petitioner respectfully prays that a writ of certiorari do issue out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of West Virginia commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment herein of the said Supreme Court of Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

MUNICIPAL ACCEPTANCE CORPORATION,
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